

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**INCOME TAX REFERENCE No. 47 of 1995****For Approval and Signature:****HONOURABLE MR.JUSTICE D.A.MEHTA****HONOURABLE MS.JUSTICE H.N.DEVANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

EXPRESS HOTEL P LTD - Respondent(s)

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Appearance :

MR MANISH R BHATT for Applicant

MR RAMKRISHNA B DAVE for Respondent

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 15/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. These are Cross References filed by the revenue for assessment years 1983-84 and 1984-85, and the assessee for assessment year 1984-85. The Income Tax Appellate Tribunal, Ahmedabad Bench "C" has referred the following question under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the revenue for assessment year 1983-84 :

R.A. No.470/Ahd/1992 :

"Whether, the Appellate Tribunal is right in law and on facts in directing the Income Tax Officer to allow deduction of Rs.7,64,769/- as statutory liability of luxury tax collected by the assessee?"

2. The assessee company runs a hotel. For assessment year 1983-84, the accounting period is the financial year ended on 31st March 1983. It was originally assessed under Section 143(3) of the Act on a total income of Rs.17,36,262/-. The CIT initiated action under Section 263 of the Act, as according to him, an amount of Rs.7,64,769/- being the luxury tax recovered by the assessee from its customers had not been included in the total receipts by the assessee. The order of CIT was challenged by way of appeal before the Tribunal by

the assessee. The Tribunal, for the reasons stated in its consolidated order dated 20th March 1992, came to the conclusion that the said amount represented trading receipts of the assessee, and the CIT was justified in exercising jurisdiction under Section 263 of the Act. However, simultaneously the Tribunal also accepted the contention on behalf of the assessee that luxury tax which was imposed by the State Government constituted a statutory liability and was, therefore, allowable as a deduction as the assessee was regularly following mercantile system of accounting.

3. Mrs. M. M. Bhatt appearing on behalf of Mr. M. R. Bhatt, the learned senior standing counsel for the applicant revenue contended that once the Tribunal had come to the conclusion that the amount of luxury tax collected by the assessee was its trading receipt, it could not have granted any deduction thereof as the assessee had not discharged any liability under the statute. That, in fact, the assessee had challenged the constitutional validity of the Luxury Tax Act and the matter was pending before the Apex Court. That, as the Apex Court had granted stay against operation of the statute, subject to certain conditions, the assessee could not

claim that any statutory liability had accrued. She, therefore, urged that, in this situation, the assessee could not have been allowed any deduction and the Tribunal had committed an error in law.

4.Mr.R.B.Dave, the learned advocate for the respondent assessee supported the order of the Tribunal stating that the liability in question was a statutory liability and whether the same was discharged or not, regardless of the dispute raised by the assessee, the assessee was entitled to deduction in light of the system of accounting regularly employed by the assessee.

5.The Tribunal has come to the conclusion that, despite the pendency of the litigation challenging the validity of the statute imposing the luxury tax, the amounts collected by the assessee from various customers represented the trading receipts of the assessee and were liable to be brought to tax. Once this is the position, the corresponding liability that the assessee was called upon to discharge by virtue of the statute would accrue on the date of the transaction, namely, when the customer visited the hotel and was billed for

various services and the amount recovered, which included the luxury tax. The stay granted by the Apex Court was conditional. The assessee was called upon to file an undertaking that, in the event of the assessee succeeding before the Apex Court, the amount recovered by the assessee would be returned to the customers. The Tribunal has found, as a matter of fact, that the bills issued by the assessee contained such an endorsement with a direction to the customer to retain the original bill till disposal of the matter pending before the Apex Court.

6. In light of the aforesaid position and the facts found by the Tribunal, it is apparent that the stay granted by the Apex Court was conditional to the detriment of the assessee concerned to the extent that it could not retain the amount collected from the customer on disposal of the matter. In case the assessee failed in its challenge before the Apex Court, it was required to make the payment to the State Government in accordance with the statute. On the other hand, if the assessee succeeded, as per the undertaking filed before the Apex Court, it was required to return the amount to the customers. Therefore, in any event, there was an

accrued liability insofar as the assessee was concerned. The Tribunal has rightly invoked and applied the ratio of the Apex Court decision in case of Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income Tax (General), Calcutta, [1971] 82 ITR 363, to hold that the liability being statutory in nature, was deductible on the basis of system of accounting regularly employed by the assessee.

7. Therefore, the question referred for assessment year 1983-84 at the instance of revenue is answered in the affirmative. The Tribunal was right in law in directing the assessing officer to allow deduction of Rs.7,64,769/- as statutory liability of luxury tax collected by the assessee. The question is accordingly answered in favour of the assessee and against the revenue.

8. For assessment year 1984-85, the following two questions have been referred at the instance of revenue:

R.A. No.471/Ahd/1992 :

[1] Whether, the Appellate Tribunal is right in law and on facts in holding

that if the unpaid sales-tax liability and municipal tax pertaining to the last quarter is paid within the time stipulated for filing of return under Section 139(1), the provisions of Section 43B cannot be made applicable?

[2] Whether, the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.7,406/- made by the Income Tax Officer under the provisions of Rule 6D observing that the assessee was right in contending that limit prescribed in Rule 6D should be applied to each tour individually, but to all tours made during the relevant year consolidated together?"

9.Mrs.M.M.Bhatt has very fairly invited attention of the Court to the decision of the Apex Court in case of Allied Motors (P) Ltd. v. Commissioner of Income Tax, [1997] 224 ITR 677, to submit that question No.1 is required to be answered in favour of the assessee and against the revenue.

10.Accordingly, question No.1 for assessment year 1984-85 is answered in the affirmative i.e. in favour of the assessee and against the revenue. The Tribunal was

justified in law in holding that, if unpaid sales tax liability and municipal tax pertaining to last quarter of the accounting period are paid within the time stipulated for filing return of income under Section 139(1) of the Act, Section 43B cannot be invoked for disallowing the same.

11. Insofar as second question is concerned, the issue is no longer *res integra*. In a decision rendered by this Court in case of Commissioner of Income Tax v. Nutan Mills Ltd. in Income Tax Reference No.54 of 1988, dated 6/2/2001, it has been laid down that, while applying provisions of Rule 6D of the Income Tax Rules, 1962, actual expenditure incurred on each trip has to be ascertained and it is not permissible to apply the provision with reference to totality of the trips made by an individual employee. Applying the ratio to the facts found by the Tribunal, it is apparent that the Tribunal committed an error in holding that the limit prescribed in Rule 6D of the Rules should not be applied to each tour individually, but to all tours made during the relevant year consolidated together.

12. Accordingly, question No.2 for assessment year 1984-85

is answered in the negative i.e. in favour of revenue and against the assessee.

13. For assessment year 1984-85, the assessee also preferred reference application and the following question has been referred by the Tribunal:

R.A. No. 506/Ahd/1992 :

“Whether, on the facts and circumstances of the case, the Tribunal was right in denying the deduction of subsisting liability by invoking provisions of Section 43B, although the section was neither invoked by the lower authorities nor was the ground urged in appeal petition of the revenue?”

14. Mr. R.B. Dave, the learned advocate appearing on behalf of the assessee submitted that provisions of Section 43B of the act had never been pressed into service by either of the authorities and the Tribunal had, for the first time, on its own, invoked the same, while holding that the assessee's liability to pay luxury tax could not be allowed as a deduction on the basis of system of accounting, but had to be allowed only on actual payment in light of provision of Section 43B of the

Act.

15.It is not disputed that the provision is applicable for the assessment year in question i.e. assessment year 1984-85. Once that is the position, while determining the tax liability of the assessee under the Act, all the relevant provisions of the Act have to be applied by the authority concerned for the purposes of bringing in receipts to tax or granting any deduction or allowance. An appeal being continuation of original proceedings and Tribunal being the last fact finding authority, required to determine the liability under the Act, was justified in applying relevant provision, namely, Section 43B of the Act, to the facts found.

16.In the result, the question referred at the instance of the assessee for assessment year 1984-85 is answered in the affirmative i.e. in favour of the revenue and against the assessee.

17.The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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